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Issue Date: 21 October 2003

CASE NO.: 2002-STA-0034

In the Matter of:

JOHN GRIFFITH,
Complainant
v.

ATLANTIC INLAND CARRIER,
Respondent

Appearances:
Paul O. Taylor, Esquire, for Complainant
W. Byrd Warlick, Esquire, for Respondent

Before:
RICHARD E. HUDDLESTON,
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions found at § 31105 of the Surface Transportation Assistance Act of 1982, (hereinafter, "STAA" or the "Act"), as amended, 49 U.S.C. § 31101, *et seq*.; the regulations promulgated thereunder at 29 C.F.R. Part 1978; and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. Part 18. A hearing was scheduled to commence on Tuesday, May 6, 2003, at 9:00 a.m. at the United States District Court, 500 East Ford Street, Grand Jury Courtroom, Augusta, Georgia, 30901, pursuant to a Notice of Hearing issued on December 4, 2002.

STATEMENT OF THE CASE

On or about February 11, 2002, Complainant John Griffith (hereinafter, Complainant) timely filed a complaint with the United States Department of Labor, Occupational Safety and Health Administration (OSHA), alleging that Respondent, Atlantic Inland Carrier (hereinafter, Respondent), violated 49 U.S.C. § 31105, also known as Section 405 of the Act. In the complaint, Complainant alleged that Respondent discriminated against him by discharging him because of his complaints to Respondent and to Schilli Leasing Maintenance ("SLM"), the owner of the trucks operated by Respondent, regarding safety concerns of the truck and trailer he drove for Respondent. More specifically, Complainant's safety concerns focused on asserted

violations of the Federal Motor Carrier Safety Regulations byRespondent and Schilli Leasing. (Sec'y Findings & Order, May 2, 2002, at 1).

Pursuant to 29 CFR § 1978.103 (2002), the complaint was investigated by OSHA, and the Assistant Secretary of Labor issued a Findings and Preliminary Order on or about May 2, 2002, as directed by 29 CFR § 1978.104 (2002), finding thatthe complaint had no merit. (Sec'y Findings & Order, May 2, 2002, at 2). Complainant, proceeding pro se, timely objected to the Findings and Preliminary Order and requested a hearing. (Joint Exhibit 1, Factual Stipulation, at 2).[1] A formal, de novo hearing was initially scheduled for August 9, 2002. By correspondence dated July 29, 2002, Complainant requested a continuance to allow him time to obtain counsel. Finding good cause, the August 9, 2002, hearing was cancelled and was rescheduled to February 27, 2003, in Augusta, Georgia.

The parties convened on February 27, 2003. At the hearing, Complainant appeared pro se and presented that he was not prepared to go forward with his case because Respondent had not produced certain documents that he (Complainant) had previously requested. (Transcript of Feb. 27, 2003, at 6). Complainant further stated that he had not had sufficient time to examine other documents that he had received from Respondent on the evening of February 26, 2003. (Tr. of Feb. 27, 2003, at 6-7). Complainant once again requested a continuance to allow Respondent to produce the theretofore un-produced documents. (Tr. of Feb. 27, 2003, at 7). A second continuance was granted, (Tr. of Feb. 27, 2003, at 22), and the hearing was continued to May 6, 2003.

A formal hearing was conducted in Augusta, Georgia, on May 6, 7, and 8, 2003. At the time and place for hearing, both Complainant and Respondent appeared and were represented by counsel. Both parties presented evidence and argument. During the hearing, Complainant submitted thirty exhibits, identified as CX-1 through CX 20, CX-22, CX-24 through CX-27, CX-29, CX-31 through CX-33, and CX-35,[2] which were admitted without objection. (Tr. of May 6, 2003, at 8-16, 173, 203; Tr. of May 7, 2003, at 299, 309, 399, 402). Respondent submitted thirteen exhibits, identified as RX-1 through RX-13, which were admitted without objection. (Tr. of May 6, 2003, at 18-19; Tr. of May 8, 2003, at 659). Additionally, the parties submitted one joint exhibit, JX-1, which was admitted into evidence. (Tr. of May 6, 2003, at 6). The record was held open by for a period of sixty days for submission of post-hearing briefs. (Tr. of May 8, 2003, at 718-19). Complainant's brief was filed on July 9, 2003.[3] Respndent's brief was filed on June 27, 2003.

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[1] The following abbreviations will be used to refer to the parties' exhibits: "JX" shall denote Joint Exhibit; "CX" shall denote Complainant's exhibits; "RX" shall denote Respondent's exhibits; and "Tr." shall denote the transcript. Because the trial spanned three days, the transcript will be identified by date for reference purposes.

[2] CX-34, which consisted of QualCom records in addition to those admitted in CX-31, was initially admitted into evidence as well. (Tr. of May 7, 2003, at 247). However, CX-34 was later incorporated into CX-31 so that the messages could be read in chronological order. (Tr. of May 7, 2003, at 246-47).

[3] Counsel for Complainant sent a brief postmarked July 3, 2003; however, as of the morning of July 8, 2003, this office had not receive the brief. Counsel re-sent the brief via expedited courier service, and that brief was received on July 9, 2003, along with the brief initially sent on July 3, 2003. Because counsel's first submission was postmarked within the allotted time for the post-hearing briefs, I find that Complainant timely filed his post-hearing brief.

The findings and conclusions thatfollow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATED FACTS[4]

The parties agreed to the following stipulations of fact, which were offered and admitted into evidence at the hearing pursuant to 29 C.F.R. § 18.51 (2003):

1. Complainant is an individual residing in Aiken, South Carolina. From October 30, 2001, to December 28, 2001, Complainant was an employee of Respondent as defined in 49 U.S.C. § 31101(2).[5]

2. Respondent is engaged in interstate trucking operations and is an employer subject to the STAA.

3. As an employee of Respondent, Complainant operated commercial motor vehicles for Respondent having a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce.

4. At all times material, Respondent was an employer as defined at 49 U.S.C. § 31101(3).

5. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.

6. After his discharge by Respondent, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him and discharged him in violation of the employee protection provisions of the STAA found at 49 U.S.C. § 31105.

7. Complainant filed timely objections to the Secretary's Findings and Preliminary Order.

(Tr. of May 6, 2003, at 6).

DISCUSSION

Jurisdiction

The instant matter is somewhat unique jurisdictionally in that Complainant resided, on the date that the violation occurred, in Aiken, South Carolina, which is within the jurisdiction of

[4] The parties' Factual Stipulations were submitted as Joint Exhibit 1 (JX-1).

[5] The parties' Factual Stipulations contain an apparent typographical error as to dates of Complainant's employment. While the stipulations purport that Complainant was employed from October 30, 2001, to December 28, 2002, the evidence at trial as well as other pleadings in this case state that the actual period of time Complainant was employed was two months, from October 30, 2001, to December 28, 2001. This recommended decision and order will refer to the correct date to maintain the integrity of the record in this case.

the United States Court of Appeals for the Fourth Circuit. The parties have stipulated to the location of Complainant's residence. (*See* JX-1, and Stipulated Facts, above). Additionally, as discussed below, Complainant was physically present in the state of North Carolina, also in the Fourth Circuit's jurisdiction, when he was discharged from employment with Respondent. However, Respondent's place of business is located in Americus, Georgia, (Tr. of May 8, 2003, at 704), which is within the jurisdiction of the Eleventh Circuit Court of Appeals. Further, the formal hearing was held in Augusta, Georgia, which is where courtroom space was available nearest Complainant's residence.

Under 49 U.S.C. § 31105(c), a petition for review of this case properly lies "in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation." The statute does not express a preference between where the violation occurred and where the employee resided when the violation occurred, if those locations are different. While the issue of jurisdiction was briefly addressed by the parties at the commencement of the hearing on May 6, 2003, neither of the parties discussed the issue of applicable law in their respective post-hearing briefs.

Clearly the authority to determine where any appeal might lay rests not here, but with the Courts of Appeals. However, these facts are set out to facilitate such determination, in the event of an appeal.

Applicable Law

Complainant's position, briefly stated, is that he engaged in protected activity under Section 405 of the Act, and as a result of that activity, he was discharged from employment with Respondent. Section 405 provides that:

> (a) Prohibitions—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceedings related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > (B) the employee refuses to operate a vehicle because—
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 31105(a) (2002).

Congress enacted the Surface Transportation Assistance Act to "combat[] the 'increasing number of deaths, injuries, and property damages due to commercial motor vehicle accidents.'" *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting 128 CONG. REC. 32509, 32510 (1982) (statement of Sen. Danforth)). The purpose of Section 405 is to "protect[] employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Id.* at 255.

"The basic Title VII proof scheme governs actions under the STAA." *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 983 (4th Cir. 1993) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)); *see also Moon v. Transport Drivers, Inc*, 836 F.2d 226, 229 (6th Cir. 1987). The Supreme Court established the "basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment" in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The employee carries the initial burden of proof and must establish, by a preponderance of the evidence, a prima facie case thatthe Act was violated. *Id.* at 252-53. Establishing a prima facie case creates the inference that the protected activity was likely the reason for the adverse action. *Id*. at 253.

To establish a prima facie case of retaliatory discharge under Section 405, the employee must establish the following: "(1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of his employer." *Moon*, 836 F.2d at 229; *see also Burdine*, 450 U.S. at 252-53. To aid in the proof of the third element, the employee needs to show that the employer was aware that the employee had engaged in protected activity when the adverse employment action was taken against the employee. *Moon*, 836 F.2d at 229 n.1.

If the employee establishes a prima facie case, the employer must then "'articulate some legitimate nondiscriminatory reason for the employee's rejection'" to rebut the inference of discrimination. *Burdine*, 450 U.S. at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802). If a legitimate nondiscriminatory reason is articulated by the employer, the burden of proof shifts back to the employee to show, "by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). While the burden of proof shifts under the scheme announced in *McDonnell Douglas* (and adapted for use in STAA cases), the ultimate burden of persuasion remains, as always, with the employee to show that the employer intentionally

discriminated against the employee. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 256.

The legal analysis and the employer's burden of proof change when the facts and circumstances surrounding a discharge that allegedly violates Section 405 indicate that the employer may have had both legitimate and illegal motives for discharging an employee. A "dual motive" analysis results when the employee demonstrates thatadverse employment action taken against him or her was motivated at least in part because he or she engaged in protected activity. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989). The dual, or mixed, motive analysis is appropriate where the employer, or better stated, its representative, admits that adverse employment action was taken after certain protected actions by an employee represent "the straw that broke the camel's back." *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 878-79 (2d Cir. 1988); *Kovas v. Morin Transp., Inc.*, Case No. 92-STA-41, Sec'y Final Dec. & Order, Oct. 1, 1993, at 4. An acknowledgement by the employer of a pivotal or critical event or action taken by the employee is key in this regard.

In order to avoid liability in a dual motive case, the employer must prove, by a preponderance of the evidence, that it would have taken the adverse action regardless of the fact that the employee engaged in the protected activity. *Price Waterhouse*, 490 U.S. at 245. In this sense, then, the employer's burden becomes akin to establishing an affirmative defense. *Id*. at 246 (citing *NLRB v. Transp. Mgmt. Corp*., 462 U.S. 393, 400 (1983)). Further, when the employer violates the statute, he (the employer) "bear[s] the risk that the influence of legal and illegal motives cannot be separated." *NLRB v. Transp. Mgmt. Corp*., 462 U.S. 393, 403 (1983). As the Supreme Court stated:

> An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Price Waterhouse, 490 U.S. at 252.

It should also be noted that the United States Supreme Court recently resolved a split among the circuits as to the type of evidence necessary to meet the burden of proof in a dual motive case. In *Desert Palace, Inc. v. Costa*, the Court held that direct evidence is not necessary in a dual motive case under Title VII; instead, circumstantial evidence will suffice to raise a discrimination claim. *Desert Palace, Inc. v. Costa*, 539 U.S. ___, 123 S. Ct. 2148, 2150, 2155 (2003). In its decision, the Court cites the watershed *Price Waterhouse* decision. *Id*. at 2153-54. The dual motive test announced in *Price Waterhouse* has been applied to dual motive cases under an array of statutes, not just Title VII dual motive cases. Therefore, *Costa* could be interpreted as modifying the evidentiary standard necessary for all dual motive cases, not just those under Title VII. The ultimate interpretation of this issue need not be decided here.

In a dual motive case, then, the analysis would be as follows. The employee must establish a prima facie case. If it appears from the prima facie evidence that the employer had both legal and illegal motives for the adverse employment action, the employer's burden then becomes one of establishing the affirmative defense as outlined above. If the employer successfully establishes such a defense, the burden of proof then shifts back to the employee to show that the reasons given as part of the employer's affirmative defense are merely a pretext for discrimination.

1. Prima Facie Case—Complainant's Initial Burden

A. Did Complainant Engage in Protected Activity?

Complainant argues that he engaged in several protected activities over the course of his two-month employment with Respondent. First, Complainant asserts that that he lodged internal complaints with Respondent as to the "condition of his assigned truck-tractors and trailers . . . 'related to' violations of provisions of the Federal Motor Carrier Safety Regulations set forth at 49 C.F.R. Parts 393 and 396." (Compl. Am.Pre -Hr'g Stmt, at 2). Second, Complainant argues that he engaged in protected activity when he spoke with Officer Christopher Justice of the North Carolina Division of Motor Vehicles Commercial scale at Efland, North Carolina, (hereinafter, "scale" or "weigh station") and further when he took the truck to the weigh station at Efland for Officer Justice to evaluate and inspect. (Compl. Am. Pre-Hr'g Stmt., at 2-3). Finally, Complainant contends that he engaged in protected activity by refusing to operate his assigned truck and trailer to avoid violation of the Federal Motor Carrier Safety Regulations, 49 C.F.R. Parts 393 and 396, because Respondent refused to perform certain repairs. (Compl. Am. Pre-Hr'g Stmt., at 3-4).

Protected activity under the STAA encompasses the filing of a complaint or beginning of a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order" or an employee's testimony in such a proceeding. 49 U.S.C. § 31105(a)(1)(A) (2002). A complaint includes one made internally to the employer. *See Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998) (citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (oral complaints to supervisor "are protected activity under the STAA"); *Moon v. Transport Drivers, Inc*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors)).

Complaints made externally, *i.e.*, to government officials, are also covered under the statute. *See Clean Harbors*, 146 F.3d at 20-21 ("A court or agency filing itself "'beg[ins] a proceeding.'") (citing *Bailey v. United States*, 516 U.S. 137, 146 (1995)). The Secretary has previously held that the filing of a complaint with a state government agency, such as a department of transportation, is covered by the statute. *Asst. Sec'y v. Sketne*, Case No. 1994-STA-17, Sec'y Final Dec. & Order, Mar. 16, 1995, at 2-4. Government officials include officers assigned to "weigh stations" to inspect vehicles to ensure compliance with Department of Transportation and other motor carrier safety regulations. *Williams v. Carretta Trucking, Inc.*, Case No. 1994-STA-7, Sec'y Final Dec. & Order, Feb. 15, 1995, at 3. The Secretary has held that "[s]eeking such an inspection [at a weigh station] is a means to enforce motor carrier safety

regulations . . . [and] should be treated as protected activity under the STAA's complaint section." *Id*.

All complaints, whether internal or external, must "relate[] to a violation of a commercial motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A) (2002). Courts have construed "relate to" broadly to encompass violations of both federal and state laws as well as employer's own safety rules. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, protection under this subsection is not dependent upon the employee actually proving a violation. *Id.* at 357. "The primary consideration is not the outcome of the underlying grievance hearing, but whether the proceeding is based upon possible safety violations." *Id*.

An employee is also protected under Section 405 of the Act if he or she "refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i) (2002). A key distinction between subsection (B)(i) and subsection (A), discussed above, is that (B)(i) requires proof that an actual violation would have occurred had the employee not refused to operate the vehicle. *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993) (finding that the employee must in fact prove an actual safety violation to be afforded protection under this subsection of the Act and that "a mere good-faith belief in a violation does not suffice" under Section 31105(a)(1)(B)(i)).

Finally, Section 405 protects an employee who refuses to operate his or her assigned vehicle because he or she has "a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe conditions." 49 U.S.C. § 31105(a)(1)(B)(ii) (2002). This subsection affords protection only to an employee if a "reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." *Id*. § 31105(a)(2). Further, an employer must have refused to correct the problem after being made aware of the problem by the employee. *Id*.

As background, Complainant testified that he is a high school graduate who holds a commercial driver's license. Complainant also attended professional driving school. (Tr. of May 6, 2003, at 178-79). He has been a professional truck driver since 1997, and prior to that worked in the auto parts industry. (Tr. of May 8, 2003, at 580). Complainant applied for employment with Respondent and attended driver orientation in Americus, Georgia. Complainant was hired as a long haul driver for Respondent on October 30, 2001. (Tr. of May 6, 2003, at 91, 180-81; JX-1).

During orientation, Complainant testified that Respondent's operating procedures were covered, including safety procedures. (Tr. of May 6, 2003, at 180-81). Complainant stated that he had the opportunity during orientation to speak with Mr. Michael Blackstock,[6] terminal manager for Respondent at their Americus, Georgia, location. (Tr. of May 6, 2003, at 31, 181-82). Complainant stated that he discussed with Mr. Blackstock his desire to perform

[6] Mr. Blackstock served as the designated representative of Respondent throughout the hearing. (*See* Tr. of May 6, 2003, at 4-5).

maintenance on the truck to which he was assigned, and the procedure for getting reimbursed for the parts that he used in performing such maintenance. (Tr. of May 6, 2003, at 181-82). According to Mr. Blackstock, the normal procedure for reimbursement requires that the driver obtain approval from Schilli Leasing Maintenance before purchasing items and installing them on his assigned truck.[7] (Tr. of May 6, 2003, at 101). Drivers are also required to report repair issues to SLM, so that SLM can arrange for repairs to be made at a designated repair facility. (Tr. of May 6, 2003, at 101).

Complainant asserts that he made internal complaints regarding safety issues on his truck to Respondent and SLM during his employment with Respondent. Complainant recounted five primary instances of safety complaints: (1) initial concerns on his assigned truck; (2) the Hurricane, West Virginia, incident involving a leaking air spring; (3) the Remington, Indiana, incident involving various items, including an expired annual inspection sticker and problems with shocks; (4) the Nashville, Tennessee, incident involving a headlight and oil; and finally, (5) the events that transpired at the North Carolina weigh station on December 28, 2001.

Upon hire, Complainant was assigned to drive a truck referred to in the testimony as unit 7201. (Tr. of May 6, 2003, at 183). Complainant inspected the truck upon assignment, and discovered various items in need of repair. (Tr. of May 6, 2003, at 184-85). He also noted that the annual inspection sticker was expired when he began operating the truck. (Tr. of May 8, 2003, at 570). Complainant testified that these items, which he stated included safety items, were not repaired until November 21, 2001, approximately three weeks after Complainant began working for Respondent. (Tr. of May 6, 2003, at 200-02; Tr. of May 8, 2003, at 570).

On December 6, 2001, Complainant sent a "breakdown in service" message to SLM, stating that he had detected an "audible air leak" in an air spring while in the Huntington/Charleston, West Virginia, area. (CX-31, QualCom Record, at 11). Mr. Blackstock testified that SLM directed Complainant to take the truck to a Hurricane, West Virginia, shop, with which the repair had been pre-arranged. (Tr. of May 6, 2003, at 110-11; CX-31, at 12-13). Mr. Blackstock further testified that the air spring problem was "definitely a safety issue." (Tr. of May 6, 2003, at 110). Complainant testified that he went to the Hurricane, West Virginia, shop, but that the shop was unable to locate a replacement part. When this occurred, Complainant stated that, upon direction from the mechanic with whom he was speaking, he left the shop. (Tr. of May 6, 2003, at 190-91; Tr. of May 8, 2003, at 586). According to Mr. Blackstock, Complainant did not inform SLM or Respondent that he was leaving the shop. (Tr. of May 6, 2003, at 112).

Complainant, on his own, located a replacement air spring while in Kernersville, North Carolina, and received purchase approval from SLM. (Tr. of May 6, 2003, at 191-92; CX-8, Triad Equip. Invoice, Dec. 7, 2001, at 1). The part was eventually replaced in Greensboro, North Carolina, at Triad Freightliner. (Tr. of May 6, 2003, at 199). Mr. Blackstock testified that he did not believe Complainant had received approval to get the repair completed at Triad Freightliner;

[7] Respondent leases the trucks that it operates from Schilli Leasing. Schilli Leasing "provide[s] equipment to private carriers and a maintenance contract to maintain such equipment." (CX-27, Dep. of Steven W. Wilken, Mar. 28, 2003, at 3). Authorization for repairs must be obtained from Schilli Leasing Maintenance. (Tr. of May 6, 2003, at 80, 118; CX-27, at 5).

instead, he believed that after purchasing the replacement air spring, Complainant went to Triad Freightliner after suggesting this location to SLM. (Tr. of May 6, 2003, at 113-14, 195). The QualCom records for this time period are inconclusive as to this point. (CX-31, at 24(b)-25(b)).[8] However, Mr. Blackstock testified that there was no "write-up" [reprimand] placed in Complainant's file as a result of this incident. (Tr. of May 6, 2003, at 156, 162).

On December 8, 2001, Complainant was en route to deliver a load in Indiana when he sent a QualCom message to SLM advising of several problems, including a "slick tire," expired inspection sticker, and broken shocks and shock absorber bushings. (CX-31, at 25(c)). Complainant was directed by SLM that the repairs could be made in Schilli's Remington, Indiana, shop after Complainant delivered his load. (CX-31, at 25(d)). Complainant relayed this information to Marilyn Mathes, dispatcher for Respondent and Complainant's immediate supervisor, telling her that SLM wanted her to "deadhead"[9] him to the Remington shop from his location in or around Wabash, Indiana, approximately a two-hour drive. (Tr. of May 7, 2003, at 411, 450; Tr. of May 8, 2003, at 515-16; CX-31, at 27(e)). Ms. Mathes refused to "deadhead" Complainant, and instead instructed him to call SLM to make alternative arrangements at a closer shop. (CX-31, at 27(f), 27(p)). Ms. Mathes offered to send Complainant to a closer shop, or arrange for the repairs to be made at the Americus, Georgia, location when he returned; however, Complainant declined both suggestions. (Tr. of May 7, 2003, at 410-11; CX-31, at 35-36). Mr. Blackstock testified that he interpreted Complainant's declination as meaning either the repairs were not important or that he did not desire to have the repairs made. (Tr. of May 6, 2003, at 109).

While in Nashville, Tennessee, on December 13, 2001, Complainant sent a QualCom message to SLM asking for a purchase order number for a replacement headlight and a case of oil that he purchased. (CX-31, at 42). Respondent and SLM questioned Complainant's actions of replacing the headlight and buying the oil without prior authorization. (Tr. of May 6, 2003, at 101-02; CX-31, at 48, 50). At one point, Complainant stated that he had removed the headlight that he had already installed and requested direction to a repair facility for a new headlight. (CX-31, at 54). Complainant statedn a QualCom message to SLM that the headlight was a necessary repair because it was raining. (CX-31, at 55-56). According to Mr. Blackstock's testimony, Ms. Mathes eventually went "outside procedures" and gave Complainant a purchase order number in order to get Complainant to the location to pick up his next load. (Tr. of May 6, 2003, at 103).

During the Nashville segment of exchanges, Complainant reminded Respondent and SLM that "zero defect DOT's is my goal." (CX-31, at 53). Complainant testified that it was his desire that his assigned truck be "one hundred percent, one hundred percent of the time," operating within the Department of Transportation regulations. (Tr. of May 6, 2003, at 213; Tr. of May 8, 2003, at 571). Mr. Blackstock testified that Complainant's wish "stuck out in [his] mind" and characterized Complainant's goal as "demanding," "extremely impractical," "impossible," and "too extreme." (Tr. of May 6, 2003, at 88-89). Mr. Blackstock went on to testify that Complainant's impractical and demanding nature was "part of the reason" that

[8] Several times throughout the course of the hearing, Complainant asserted that a number of QualCom messages were missing from the records that Respondent submitted to him. (*See* Tr. of May 6, 2003, at 194, 216; Tr. of May 7, 2003, at 330)

[9] "Deadheading" refers to traveling without a load, typically with an empty trailer. (Tr. of May 6, 2003, at 118).

Complainant "wouldn't last as a long term employee with Atlantic Inland." (Tr. of May 6, 2003, at 89-90).

The crucial protected activity by Complainant was his conversations (both telephonic and in person) with Officer Justice and subsequently taking his truck to the weigh station for inspection on December 28, 2001. The events leading up to December 28, 2001, began on December 22, 2001, when Complainant sent a "breakdown in service" message to SLM, stating that a bolt on the trailer frame was loose, and that he was experiencing problems with the shocks and shock bushings. (CX-31, at 153-54). Complainant discovered these problems during his pre-trip inspection. (Tr. of May 7, 2003, at 302). In subsequent messages, Complainant stated that he was also experiencing problems with the air compressor. (CX-31, at 167-68). Mr. Blackstock testified that his knowledge was that the air compressor problem was a safety issue because of the compressor's role in the operation of the brakes of the truck. (Tr. of May 6, 2003, at 165). Complainant concurred that the problems he experienced on December 22 with the air compressor represented not only a safety problem, but in his mind also a "DOT problem." (Tr. of May 7, 2003, at 325-26, 336). As to the problem with the trailer frame, Complainant testified that a loose bolt such as the one on his trailer would result in an out of service violation because the bolt "keeps the axles located under the trailer." (Tr. of May 7, 2003, at 301, 336). Complainant and SLM exchanged several messages in an attempt to coordinate the repairs, and SLM eventually advised Complainant to take the truck and trailer to a shop after he delivered his load on December 26, 2001. (Tr. of May 7, 2003, at 306;CX -31, at 163).

After arriving at his destination, Complainant updated SLM on the problems he was experiencing via QualCom messages, and stated that he would go to Triad Freightliner in Greensboro, North Carolina, as soon as his load was emptied. (CX-31, at 182-85). SLM then sent Complainant a QualCom message to ascertain his estimated time of arrival to the repair facility, to which Complainant responded. (Tr. of May 7, 2003, at 331; CX-31, at 189-90). Complainant testified that he received authorization from a man named Chris at SLM to go to the Triad Freightliner facility in Greensboro, but that the QualCom message reflecting the permission was absent from the messages Respondent submitted in response to Complainant's discovery requests. (Tr. of May 7, 2003, at 330-31).

Complainant arrived at Triad Freightliner in Greensboro on December 26, 2001, at approximately 9:00 p.m. (Tr. of May 8, 2003, at 651; CX-31, at 190). At approximately 10:30 a.m. the following morning, Complainant learned that SLM had cancelled the repairs on the trailer. (Tr. of May 7, 2003, at 334-35; CX-31, at 196-96(a)). There is conflicting testimony as to whether SLM cancelled the repairs on the trailer, or whether Triad Freightliner informed SLM that it did not routinely perform the kind of maintenance work that the trailer needed. Mr. Blackstock testified that SLM had declined to have the trailer repaired at the Triad facility, instead opting to repair the trailer at one of its own facilities at a later date. (Tr. of May 6, 2003, at 37-38, 61-62; CX-10, Triad Freightliner Record, at 2; CX-12, Schilli Leasing Inc. Road Call Records, at 19-20). SLM sent Complainant a QualCom message to that effect as well. (*See* CX-31, at 196(a)). Mr. Blackstock later testified, however, that the repairs were not performed on the trailer at the Triad facility because that facility did not perform that kind of service. (Tr. of May 6, 2003, at 76). Terry Sands, shop foreman at the Triad Freighliner facility, confirmed that Triad Freightliner did not perform trailer maintenance. (CX-26, Deposition of Claude Terry

Sands, Mar. 27, 2003, at 20). Mr. Sands also testified at his deposition that a note on the repair order prepared by Triad directed Triad not to work on the trailer. (CX -26, at 23; CX-10, Triad Freightliner Repair Order, at 2).

Shortly after Complainant arrived at Triad Freightliner on December 26, he received a message from Ms. Mathes asking whether he could pick up a certain load; in response, he informed her that his truck was being worked on pursuant to the authorization of SLM. (Tr. of May 7, 2003, at 331; CX-31, at 191). The following morning, Complainant received another message from Ms. Mathes telling him that he needed to pick up his next load. (Tr. of May 7, 2003, at 335; CX-31, at 198). At this point, no repairs had been performed on the truck. (Tr. of May 7, 2003, at 335-36). Complainant responded to Ms. Mathesthat

> Apparently you guys don't believe in DOT regulations. As a professional driver and with full authority of federal regulations, drivers most certainly can instigate maintenance actions. Actually, I have final say weather [*sic*] this rig is safe to operate or not over both dispatch and/or maintenance. Air compressor and suspension problems must be addressed before my next dispatch.

(CX-31, at 200).[10] Mr. Blackstock testified that Ms. Mathes showed him this message shortly after she received it. (Tr. of May 6, 2003, at 70-71). He testified that it bothered him that Complainant "was deciding that he was going to take control of the truck," though Mr. Blackstock stated he did believe that the repairs needed to be completed. (Tr. of May 6, 2003, at 71). Complainant sent Ms. Mathes another QualCom message in which he stated that the maintenance was properly arranged. (Tr. of May 7, 2003, at 336-37). In a subsequent message, Ms. Mathes informed Complainant that "We are going to chose [*sic*] not to dispatch you anymore then!" (CX-31, at 205).

By the mid-afternoon on December 27, 2001, repairs had not commenced on Complainant's truck. (Tr. of May 6, 2003, at 119; RX-9, TransMan Computer Records, at 5-6). After the truck was evaluated by Triad Freightliner, discussion ensued between Triad Freightliner and SLM as to the cost of repairs and which repairs would be performed. A price was finally determined and agreed to on December 28. (Tr. of May 6, 2003, at 120-21; RX-9, at 6; CX-27, Dep. of Steven W. Wilken, Mar. 28, 2003, at 18-20).

Complainant believed that safety issues were involved and called the North Carolina weigh station, operated by the North Carolina Department of Motor Vehicles, in Efland, North Carolina, at approximately 3:30 p.m. on December 27. (Tr. of May 7, 2003, at 342;CX -24, Dep. of Officer Christopher Justice, at 6). He spoke with Officer Christopher Justice, and requested that Officer Justice come to the Triad Freightliner facility in Greensboro and inspect his truck and trailer. Complainant made special mention of the suspension problem during this conversation. (Tr. of May 7, 2003, at 342-43). Complainant testified that Officer Justice declined to come to the Triad facility because Officer Justice "wasn't comfortable doing any

[10] The QualCom messages contained in CX-31 utilize abbreviations—that is, the parties frequently used abbreviations of common words, which shortened the overall message length. Many of these QualCom messages were read aloud during the hearing. When quoting QualCom messages, I will write out the messages without use of the abbreviations for clarity purposes and in accordance with the testimony given.

inspections on private property." (Tr. of May 7, 2003, at 344; CX-24, at 7-8). Office Justice testified at his deposition that he also informed Complainant that he would not be able to come to the facility as he was about to go off-duty, but that if he (Complainant) wanted his truck inspected, he could bring it to the weigh station the following day, December 28, 2001. (CX- 24, at 7).

Between 12:00 p.m. and 1:00 p.m. on December 28, when Complainant had been at Triad Freightliner for one and one-half days, (Tr. of May 6, 2003, at 172), he testified that he felt like no repairs were going to be made on the truck and trailer, and, with permission from Mr. Sands, took the truck and trailer to the weigh station on Interstate 85 in Efland, North Carolina. (Tr. of May 6, 2003, at 39; Tr. of May 7, 2003, at 341, 347-48; Tr. of May 8, 2003, at 607-09; CX-24, at 6; CX-26, at 34). At that point, no repairs had been made to the truck. (Tr. of May 8, 2003, at 651). Complainant testified that he felt that he "had exhausted all [his] options" and that he believed that taking the truck and trailer to the weigh station would "convince Schilli that we need[ed] to have the truck and the trailer repaired." (Tr. of May 8, 2003, at 613-14).

When he arrived at the weigh station, Complainant spoke with Officer Justice, and requested that he perform an inspection on the truck and trailer. Complainant testified that he specifically pointed out the suspension problems on the trailer, and told Officer Justice that SLM had cancelled that particular repair. (Tr. of May 7, 2003, at 349-50; CX-24, at 28). Officer Justice testified that he performed a "Level One"[11] inspection on the truck and trailer, and found it to be in violation of three sections of the Federal Motor Carriers Safety Regulations. (CX-24, at 8, 12; CX-13, North Carolina Department of Motor Vehicles Inspection Report, Dec. 28, 2001, at 1). He stated that the reason that he decided to perform a Level One inspection due to Complainant's "great[] concern" that he check the truck and trailer in detail. (CX-24, at 38). According to the inspection report and Complainant's recollection, the inspection began at 1:30 p.m. and lasted approximately forty-five minutes. (Tr. of May 7, 2003, at 351, 354; CX-13, at 1).

Officer Justice stated that the violation that placed the trailer "out of service" was the loose bolt on the torque rod, which is a violation of Section 393.207(a) of the Federal Motor Carrier Safety Regulations.[12] (CX-24, at 8-15; CX-13, at 1). Complainant testified that after Officer Justice placed the trailer "out of service," he wanted to take both the truck and the trailer back to the Triad Freightliner facility to have the repairs made; however, the officer informed him that the trailer could not leave the scale. (Tr. of May 7, 2003, at 358). Officer Justice testified that Complainant told him he wanted to take the truck and trailer back to Triad to show that a repair was needed because the trailer had received an out of service citation. (CX-24, at 36). Officer Justice explained that once a vehicle is placed out of service, it cannot be removed from the premises of the weigh station until the appropriate repairs are made. (CX-24, at 15). Officer Justice testified that Respondent was also fined one hundred dollars for the violation of

[11] Officer Justice testified that a "Level One" inspection requires that the entire vehicle be inspected, including the frame, brakes, and air lines. (CX-24, at 27). According to Officer Justice, thirty percent of the total monthly inspections performed are Level One inspections. (CX-24, at 37).

[12] 49 CFR § 393.207(a) provides that "No axle positioning part shall be cracked, broken, loose or missing. All axles must be in proper alignment." 49 C.F.R. § 393.207(a) (2002).

Section 393.207(a). (CX-24, at 8; CX-13, at 1-2). The other two violations[13] did not require that the vehicle be placed out of service; according to Officer Justice, those violations did need to be repaired "before the truck was reloaded for another route." (CX-24, at 14).

Complainant telephoned Mr. Blackstock from the weigh station and told him that the truck and trailer had been inspected, that the trailer had been put out of service, and that he needed an authorization number to pay the out of service fine. (Tr. of May 6, 2003, at 37; Tr. of May 7, 2003, at 361). Complainant testified that he told Mr. Blackstock that he had intentionally "deadlined"[14] the trailer. (Tr. of May 7, 2003, at 363). Mr. Blackstock testified that he was "irritated" and "angered" to learn that Complainant had intentionally taken the truck and trailer to the weigh station. (Tr. of May 6, 2003, at 37, 40-41). Mr. Blackstock placed a "conference call" to Steven Wilken, maintenance coordinator for SLM, and while Mr. Wilken was on the line, Complainant testified that Mr. Blackstock made a statement to the effect of "[T]his idiot has taken this trailer out to the scale and had it . . . deadlined." (Tr. of May 7, 2003, at 364). During this conversation, Mr. Blackstock effectually discharged Complainant, telling Complainant, "I want you out of this truck now." (Tr. of May 7, 2003, at 367).

A second conversation took place between Complainant and Mr. Blackstock that afternoon. (Tr. of May 7, 2003, at 366). At some point in the conversation, Officer Justice spoke with Mr. Blackstock, who verified that the trailer had been taken out of service. (Tr. of May 6, 2003, at 134). Mr. Blackstock asked Officer Justice to take the keys to the truck from Complainant. (Tr. of May 6, 2003, at 37, 134; CX-24, at 16). After conferring with his supervisor, Officer Justice informed Mr. Blackstock that the matter was a "civil issue" and that he (Officer Justice) would not get involved. (CX-24, at 16). According to Complainant, the conversation between Mr. Blackstock and Officer Justice lasted between forty-five minutes and one hour. (Tr. of May 7, 2003, at 368).

Mr. Blackstock and Complainant spoke again after Mr. Blackstock spoke with Officer Justice; at this point, they discussed the return of the truck. (Tr. of May 7, 2003, at 368-69). After this discussion, Complainant testified that he left the weigh station at approximately 5:00 p.m. (Tr. of May 7, 2003, at 369).

Upon consideration of all of the evidence, I find that Complainant engaged in protected activity as prescribed under 49 U.S.C. § 31105(a)(1)(A) when he spoke with Officer Justice on December 27 and 28, 2001, and when he took his truck and the tractor to the weigh station at Efland, North Carolina, to be inspected. As a matter of law, speaking with and making a complaint related to commercial vehicle safety issues is protected activity. *See Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998). Officer Justice testified that he was employed by the North Carolina Department of Motor Vehicles Enforcement division, clearly a state agency. (CX-24, at 6). Complainant's conversations with Officer Justice qualify as "filing a complaint" under Section 405, as he sought out Officer Justice and requested that he inspect the truck and trailer.

[13] Officer Justice also discovered that the truck and trailer were in violation of Sections 393.75 and 396.301 due to two tires with shallow tread depth and an air leak at the service glad hand. (CX-13, at 1; CX-24 at 31-35).

[14] Mr. Blackstock testified that "deadlining" referred to a truck and/or trailer being taken out of service for failure to comply with Department of Transportation guidelines. (Tr. of May 6, 2003, at 38-39).

Section 405 further requires that a complaint must "relate to" a safety regulation, and I find that this requirement is also met in the instant case. Complainant specifically mentioned the suspension problem as the source of his concern, which Complainant, Mr. Blackstock, and Officer Justice testified was a safety issue. As stated above, "relate to" has been broadly construed by the courts, and an actual violation of a law or regulation need not be proven. However, even if a court required that a violation be proven, that prerequisite would be met here because, as Officer Justice testified, the truck and trailer that Complainant took to the weigh station were cited for three violations of the Federal Motor Carrier Safety Regulations, one of which resulted in the trailerbeing placed out of service.

In addition, I find that Complainant has also proven that his internal complaints to Respondent are protected activity under Section 405. Complainant testified, and Respondent did not controvert said testimony, that on his initial inspection of his assigned truck, he noted various safety problems with the truck. The incident in Nashville, Tennessee, regarding the headlight as well as his complaints leading up to the weigh station incident also qualify as complaints regarding safety issues. Therefore, I find that these internal complaints are protected activity as well.

B. Was Adverse Employment Action Taken Following the Protected Activity?

Because I find that Complainant engaged in protected activity, I must now determine whether adverse employment action was taken following the protected activity. It is well established that "adverse employment action" includes the discharge of an employee. *See*, *e.g.*, *Castle Coal & Oil Co. v. Reich*, 55 F.3d 41, 46 (2d Cir. 1995); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The employer does not need to communicate any "magic words" to the employee for a discharge to fall under the category of "adverse employment action." *See NLRB v. Champ Corp.*, 933 F.2d 688, 692-94 (9th Cir. 1990) (no specific words necessary to constitute discharge; instead, the court looks to thereasonable inferences an employee could draw from employer's statement or conduct).

The second element of Complainant's prima facie case is easily established. While discharge is not further defined in the Act, the pervading common meaning as well as the meaning adopted in the above-mentioned case law fits the facts and circumstances of the case *sub judice*. It is undisputed that Complainant was discharged on December 28, 2001, while he was at the Efland, North Carolina, weigh station. Mr. Blackstock testified that when he spoke with Complainant at the weigh station, he told Complainant "it was not working between us and it would be the best for the two of us to separate." (Tr. of May 6, 2003, at 36). Complainant testified that Mr. Blackstock said he wanted Complainant "out of the truck." Officer Justice testified that Mr. Blackstock asked him to take the keys from Complainant's truck. The facts and testimony establish the timeline of events on December 28, 2001, with sufficient adequacy to verify that the discharge took place after Complainant arrived at the weigh station and after Officer Justice placed the truck out of service. Therefore, I find that Complainant has established the second element of his prima facie case.

C. Has Complainant Established a Causal Link Between the Protected Activity and Adverse Employment Action?

The third step in the prima facie analysis is to determine whether the employee has established a causal link between the protected activity and the adverse employment action. This includes showing that the employer was aware that the employee engaged in protected activity when the adverse employment action was taken. "[T]he proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987) (citations omitted).

Here, the elapsed time between when Complainant took the truck/trailer to the weigh station and when Respondent discharged him is a matter of hours. As Complainant testified, and as Complainant's Exhibit 13 shows, the inspection of the truck and trailer began at approximately 1:30 p.m. and lasted approximately forty-five minutes. After the inspection, several phone calls ensued between Complainant and Officer Justice to Mr. Blackstock. Complainant has shown that Respondent was aware that Complainant had undertaken protected activity by going to the weigh station prior to Mr. Blackstock discharging him. Complainant testified that he left the weigh station at approximately 5:00 p.m., which indicates that the entire chain of events on the afternoon of December 28 transpired over approximately three-and-one-half hours. Even shorter is the period of time between when Complainant called Mr. Blackstock and he (Mr. Blackstock) verbally discharged Complainant.

In my view, the proximity of time in this chain of events certainly gives rise to an inference of a causal connection between the protected activity and the adverse employment action. This inference is bolstered by the fact that Mr. Blackstock did not definitively testify that the decision to discharge Complainant was made at any time prior to him being notified by Complainant of the events at the weigh station and the subsequent "deadlining" of the truck.

Mr. Blackstock noted during his testimony that the events at the weigh station were "the straw that broke the camel's back." (Tr. of May 8, 2003, at 697; *see also* Tr. of May 6, 2003, at 82). When asked if he would have fired Complainant had the events of December 28, 2001, not occurred, Mr. Blackstock replied, "Probably not." (Tr. of May 6, 2003, at 74). During his testimony, Mr. Blackstock confirmed that he "was irate with Mr. Griffith over the entire process that had occurred between the dates of December 22nd and December 28th" and confirmed that his "mind was finally made up on the 28th . . . when [the Complainant] was at the scale." (Tr. of May 6, 2003, at 82). Ms. Mathes' testimony was that she and Mr. Blackstock discussed Complainant's employment and the possibility of his discharge on December 27, but no agreement was reached. (Tr. of May 7, 2003, at 442-43). She further testified that Complainant was never reprimanded for performance reasons and that none of the actions he undertook during his employment were "bad enough to warrant a write up" until he went to the weigh station in North Carolina. (Tr. of May 8, 2003, at 489-90).

I conclude that Complainant has established the causal link necessary and, by a preponderance of the evidence, has established a prima facie case of retaliatory discharge in violation of Section 405 of the Act. Complainant clearly engaged in protected activity upon going to the weigh station and speaking with Officer Justice regarding safety concerns of the

truck and trailer. There is no dispute that Complainant was discharged from employment with Respondent following this event. Further, a causal connection has been firmly established between these two events, especially in light of Mr. Blackstock's imprecise testimony regarding the discharge decision. Therefore, I find that Complainant has proven, by a preponderance of the evidence, a prima facie case for retaliatory discharge under Section 405 of the Act. Complainant has established that he engaged in protected activity; that adverse employment action was taken against him as a result of that protected activity; and that a causal link exists between the protected activity and the adverse employment action.

Mr. Blackstock's statements and characterization of the events are significant because they indicate that one reason, if not the sole reason, Complainant was discharged was his visit to the weigh station and the events that occurred there. Mr. Blackstock testified that, until Complainant notified him that he was at the weigh station and the trailer had been "deadlined," he (Mr. Blackstock) believed that Complainant "was still a driver for whom [his] company was trying to find a load," and had the weigh station incident not occurred, Complainant would have been assigned another load. (Tr. of May 6, 2003, at 32, 39). Mr. Blackstock further testified that his statement to Mr. Boyd, the OSHA investigator in this case, was that "'I did not make up my mind to discharge Griffith on 27 December '01.'" (Tr. of May 6, 2003, at 34).

However, I am unable to conclude based upon Complainant's prima facie evidence that the sole reason for Complainant's discharge was the events that transpired at the weigh station on December 28, 2001. While Complainant has established a prima facie case that Respondent had at least one illegal motive for discharging him, the facts and circumstances indicate that Respondent has asserted that there was also a legitimate reason for discharging Complainant. The record contains instances where it is alleged that Complainant did not follow protocol regarding having repairs made on his truck, including making repairs prior to authorization from SLM, purchasing items without authorization from SLM, and declining to have maintenance performed on his truck. Employer asserts that all of these actions by Complainant were in violation of company policy, though Mr. Blackstock testified that no formal reprimand letter or notation was placed in Complainant's file, and no other disciplinary action was taken as a result of these policy violations.

Ultimately, while it appears that there may have been more than one reason why Complainant was discharged, the facts and circumstances surrounding the discharge necessitate the analysis applicable to dual motive cases in light of the admissions by Respondent that "**the straw that broke the camel's back**" was Complainant's protected activity of going to the weigh station to have his truck/trailer inspected. This language is significant because it is an acknowledgement by Respondent's designated representative that Complainant's activity was at least one reason why he was discharged. The following analysis will follow the dual motive process outlined above.

2. Dual Motive Case Shifts the Burden to Respondent

Complainant has established that his discharge was motivated, at least in part, by his undertaking of protected activity on December 28, 2001. The evidence shows that the "straw that broke the camel's back" was Complainant's movement of his truck from the repair shop to

the weigh station to have his truck/trailer inspected and his conversation with Officer Justice regarding his safety concerns about the vehicle. However, as Respondent argues that there was also had a legitimate motive for discharging Complainant, the analysis must now shift to that required for a dual motive case. The burden of proof shifts to Respondent to show that, regardless of the protected activity engaged in by Complainant, Respondent would have taken the adverse employment action, *e.g.*, discharged Complainant.

A. Has Respondent Shown That the Company Would Have Taken the Adverse Employment Action Regardless of Whether Complainant Had Engaged in Protected Activity?

In his closing argument and post-hearing brief, counsel for Respondent asserted that Complainant was "very independent," did not follow Respondent's instructions well, and was generally insubordinate. (Tr. of May 8, 2003, at 714-15; Resp't Post-Hr'g Br., at 11). Respondent further argues that Complainant was going to be discharged prior to the weigh station incident, and that the timing of the discharge only occurred because Complainant left the repair facility on December 28, 2001. (Tr. of May 8, 2003, at 718). Respondent also claims that Complainant made a unilateral decision to go to Triad Freightliner on December 26, 2001. (Tr. of May 8, 2003, at 717).

Mr. Blackstock testified that several incidents with Complainant contributed to his termination. Those events include discussions Mr. Blackstock had with Complainant during orientation regarding repairing his assigned truck; the Hurricane, West Virginia, incident where an air spring on Complainant's truck was leaking; the Nashville, Tennessee, incident where Complainant requested reimbursement for a headlight and oil; and the events that occurred between December 22 and December 28, 2001. (Tr. of May 6, 2003, at 144). Upon further questioning by Complainant's counsel, however, Mr. Blackstock discounted all of these events, save the last event, as reasons for Complainant's discharge. Mr. Blackstock testified that the orientation discussions "did not motivate [Respondent] in any way to fire [Complainant]." (Tr. of May 6, 2003, at 145). Mr. Blackstock also confirmed that the issue regarding reimbursement for the headlight and oil"alone would not have ever motivated [Respondent] to fire [Complainant]." (Tr. of May 6, 2003, at 149). As to the Hurricane, West Virginia, incident, Mr. Blackstock stated that no "write up" was placed into Complainant's file as a result, and the issue was not further discussed with Complainant. (Tr. of May 6, 2003, at 159-60).

Mr. Blackstock was extensively questioned by counsel for both Complainant and Respondent regarding when the decision to discharge Complainant was made. Mr. Blackstock consistently testified throughout the hearing that he did not make up his mind to terminate Complainant on either December 26 or December 27, 2001. (Tr. of May 6, 2003, at 34, 61, 66). Instead, Mr. Blackstock testified at the hearing as well as when he was interviewed by the OSHA investigator that, until the time that Complainant called and said that he (Complainant) was at the weigh station, Complainant "was still a driver for whom [his] company was trying to find a load." (Tr. of May 6, 2003, at 32-34, 77). Mr. Blackstock asserted several times throughout his testimony that the decision to terminate Complainant was a "long decision," and that he knew "long before the final event [at the weigh station]" that Complainant would be discharged. (Tr. of May 6, 2003, at 33, 74). However, this statement must be balanced against Mr. Blackstock's

subsequent statement that he probably would not have discharged Complainant on December 28, 2001, had the weigh station incident not occurred. (Tr. of May 6, 2003, at 74).

Upon consideration of all of the evidence, I find that the preponderance and the more credible evidence establishes thatthe decision to discharge Complainant was actually made on December 28, 2001, and that the decision was motivated in part by Respondent's animus toward the Complainant's for taking his truck to the D.O.T. weigh station.

Respondent has not established the "but for" causation required to avoid liability in this instance. The testimony by Mr. Blackstock fails to establish by a preponderance of the evidence that, even if Complainant not taken his truck to the weigh station on December 28, 2001, Complainant would have been fired for legitimate non-discriminatory reasons. While Mr. Blackstock testified that the discharge of Complainant was *discussed* prior to December 28, 2001 (which was corroborated by the testimony of Marilyn Mathes), no definitive indication is offered by Respondent that the decision was made prior to Complainant's arrival at the weigh station. Instead, Mr. Blackstock confirmed that, had the events of December 28, 2001, at the weigh station not occurred, Complainant would probably not have been discharged on that date. This statement is further reinforced by Mr. Blackstock's statement that Complainant "was still a driver for whom [Respondent] was trying to find a load" until the time that Complainant called from the weigh station.

As noted above, the Supreme Court has warned that the employer "bears the risk that the influence of legal and illegal motives cannot be separated." The Court noted that an employer will not prevail in a mixed motive case if it cannot prove that the legitimate reasons *motivated it at the time the decision to discharge the employee was made*. This premise is particularly applicable in the instant matter. Based on the evidence before me, I cannot find that a legitimate reason motivated Respondent *at the time the decision was made* to discharge Complainant.

Therefore, to summarize, I find that Respondent has not met its burden of proving by a preponderance of the evidence that, but for Complainant engaging in protected activity, Respondent would have still discharged Complainant. I find that the decision was made as a result of Complainant taking his truck/trailer to the weigh station for inspection, and that Respondent was not in the process of discharging Complainant prior to the weigh station incident. While there may have been discussion as to the possibility of discharging Complainant, no definitive decision was made until the weigh station incident, the proverbial "straw that broke the camel's back." [15]

3. Complainant's Motion to Amend Complaint to Add Party-Respondents

During the third day of the instant hearing, at the conclusion ofthe evidence, counsel for Complainant made a motion to amend the complaint to add as party-Respondents "Wauvasha Valley Transportation, Schilli Specialist, WVT of Texas, Schilli Leasing, Schilli Transportation

[15] In making this finding, it is noted that even the actions Employer asserted as constituting legitimate non-discriminatory reasons for discharge, may be considered protected activities as they all related to truck repairs and safety. However, it is not necessary to address such, as Employer has not established that Complainant would have been discharged on December 28, 2001, even if he had not taken the truck to Officer Justice.

Services and Schilli Distribution Services." (Tr. of May 8, 2003, at 706). Counsel for Complainant argued that these companies were a "family" and were "all the alter ego of each other. . . . [and are] even referred to as divisions." (Tr. of May 8, 2003, at 706). Complainant further asserted that the DAC report[16] in Complainant's name contained the names of some of these entities. (Tr. of May 8, 2003, at 706).

Counsel for Respondent opposed Complainant's motion, citing due process concerns—specifically arguing that these entities are separate corporate entities that had not participated in the instant hearing. (Tr. of May 8, 2003, at 706-07). Respondent further argued that these entities were aware of the hearing only indirectly, and "[t]hey have not been served with any process." (Tr. of May 8, 2003, at 707).

I reserved judgment on Complainant's motion during the hearing to allow the parties to further address the motion and to provide their respective legal arguments on the issue in their post-hearing briefs. Unfortunately, neither party chose to address the issue, and therefore, I will make the determination without such input.

A. Due Process Concerns

As noted during the hearing, due process problems abound where an amendment to add party-respondents is made at this late stage of the adjudicative process. Pursuant to 29 C.F.R. §18.5(e), an Administrative Law Judge can allow an amendment to a complaint "[i]f and whenever determination of a controversy on the merits will be facilitated thereby . . . upon such conditions as are necessary to avoid prejudicing the public interest and the rights of parties." Such amendment is proper only if it "is reasonably within the scope of the original complaint" or "tried by express or implied consent of the parties." 29 C.F.R § 18.5(e) (2003).

Procedural due process requires that notice and an opportunity to be heard are given to all interested parties. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Cent. Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Section 554 of the Administrative Procedure Act provides that all interested parties shall be given "notice" of the hearing, which includes "the time, place, and nature of the hearing," "legal authority and jurisdiction," and "the matters of fact and law asserted." 5 U.S.C. § 554(b) (2002). The "opportunity to be heard" component of procedural due process requires that interested parties have the opportunity to submit facts, present argument, and participate in any proposed settlement offers. *Id*. § 554(c)(1).

B. Ruling on Complainant's Motion

At this point in the proceedings, the Assistant Secretary has completed the investigation and issued a Findings and Preliminary Order; pre-hearing statements have been filed; discovery has been completed; this hearing has been conducted and evidence presented; and post-hearing briefs have been submitted. All of these procedural steps have been taken without any participation in the investigation phase of the proceedings and without any notice and opportunity for hearing given to the entities that Complainant wishes to add as respondents.

[16] A "DAC report" contains a driver's work history (i.e., employers, periods of employment, reasons for discharge, etc.). (Tr. of May 6, 2003, at 94).

There was never any indication by counsel for Respondent that he had also been retained by the proposed additional respondents to represent their interests throughout the proceedings.

Therefore, I find that an amendment to the Complaint at this stage in the proceedings would prejudice the rights of the proposed additional party-respondents, and such an amendment would be inconsistent with Section 18.5(e). While I agree that the DAC report, admitted as Complainant's Exhibit 19, does contain the names of several other entities, procedural due process requires that only the originally named party-Respondent, Atlantic Inland Carrier, is a proper respondent in this case. Atlantic Inland Carrier is the only party which received notice of these proceedings and that has had a full and fair opportunity to be heard during all stages of these proceedings. For those reasons, Complainant's Motion to Amend Complaint to Add Party Respondents is denied.

4. Damages

Because I have found that Respondent engaged in retaliatory discharge in violation of Section 405 of the Act, and further that Respondent has not proven that the discharge would have occurred in the absence of Complainant's protected activity, I must now determine the damages to which Complainant is entitled.

Section 405 of the Act provides for the following remedies if an employer violates the Act:

> (3)(A) If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to—
>
> (i) take affirmative action to abate the violation;
>
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
>
> (iii) pay compensatory damages, including back pay.
>
> (B) If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.

49 U.S.C. §§ 31105(b)(3)(A)–(B) (2002).

By enacting subsection (b)(3), Congress sought to "balanc[e] the relative interests of the Government, employee, and employer." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 259 (1987). The reinstatement provision gives effectiveness to the employee protection provisions by ensuring that employees do not "hav[e] to choose between operating an unsafe vehicle and losing [their] job" by allowing reinstatement pending a complete review. *Id.* at 258-59. An

award of back pay to an employee "make[s] the employee whole, that is, [] restore[s] the employee to the same position he would have been in if not discriminated against." *Johnson v. Roadway Express, Inc.*, Case No. 1999-STA-5, ARB Dec. & Order of Remand, Mar. 29, 2000, at 13 (citations omitted); *see also Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1278 (4th Cir. 1985).

After an employee establishes that he was discriminated against, "the allocation of the burden of proof is reversed. It is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment." *Johnson*, Case No. 1999-STA-5, at 13 (citing *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986)); *see also Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1983). The employer may succeed on his burden if he proves that "comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment." *Johnson*, Case No. 1999-STA-5, at 13 (citations omitted). To this end, "[a] discharged employee must make a reasonable effort to mitigate his damages." *Trans Fleet Enters., Inc. v. Boone*, 987 F.2d 1000, 1005 (4th Cir. 1992) (citing *O'Neal v. Gresham*, 519 F.2d 803, 805 (4th Cir. 1975)).

A. Complainant's Prayer for Relief

In his post-hearing brief, Complainant seeks the following:

1. Reinstatement to his position with Respondent;

2. Back pay of $67,706.80 plus $868.00 per week from June 30, 2003 until reinstatement, less any interim wages;

3. The sum of $563.21 for deductions taken from his pay on February 1, 2002, and February 8, 2002;

4. Interest on the back pay award; and

5. An award of attorney fees and costs.

(Compl. Post-Hr'g Br., at 50; *see also* Tr. of May 7, 2003, at 400). No other monetary compensatory damages are sought. (Tr. of May 7, 2003, at 403-04).

Complainant also requests non-monetary relief, namely, that Respondent "post any decision favorable to him at all of its terminals for a period of 60 consecutive days in conspicuous places, including all places where employee notices are customarily posted." (Compl. Post-Hr'g Br., at 49-50). Complainant further requests that "all adverse information concerning Complainant's protected activity" be deleted from Respondent's personnel files, as well as that Respondent be ordered to amend the DAC Services report to delete "unfavorable information;" delete the "request for personal contact;" "show that Complainant is eligible for rehire;" and to show that Complainant's employment with Respondent was uninterrupted. (Compl. Post-Hr'g Br., at 50; *see also* Tr. of May 7, 2003, at 400).

B. Availability of Comparable Jobs

Respondent offered essentially no information regarding the availability of comparable jobs, other than Mr. Blackstock's opinion testimony that turnover was high throughout the trucking industry. (Tr. of May 8, 2003, at 695-96). Respondent offers no specific evidence of employment opportunities available nor did it offer evidence that Complainant refused to accept employment offers. This evidence is insufficient to prove that comparable jobs were available to Complainant. *See Johnson*, Case No. 1999-STA-5, at 14 (citing *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988)).

However, Respondent asserts thatComplainant's previous employment history contributed to Complainant's trouble in finding a job, and therefore, that Respondent was not the sole cause of Complainant being unemployed. (Respondent's Post-Hr'g Br., at 10). Complainant testified that prior to gaining employment with Respondent, he had trouble finding work due to problems on his DAC report regarding prior employment. (Tr. of May 8, 2003, at 574-75, 578). Complainant stated that his DAC report had been amended by one previous employer, but that Respondent's comments on his DAC report along with previous employment notations together hurt his chances of finding new employment. (Tr. of May 8, 2003, at 576-77).

Upon consideration, I find that Respondent has failed to carry its burden of proving that comparable jobs were available. Mr. Blackstock's brief statements as to the turnover of drivers in the trucking industry will not suffice to carry Respondent's burden on this point. Because Respondent did not prove the first prong of the mitigation test, relief is proper in this case. The "reasonable diligence" prong will nonetheless be addressed.

C. Reasonable Diligence in Seeking Substantially Equivalent Employment

Respondent alleges that it is not responsible for the full amount of Complainant's lost wages because he (Complainant) did not mitigate his damages by failing to seek substantially equivalent employment. (Tr. of May 8, 2003, at 581). However, Respondent has again failed to adduce any evidence to this extent. Complainant testified specifically that he attempted to gain employment with at least twenty-three trucking companies. (Tr. of May 7, 2003, at 378-95). He stated that his efforts included filling out employment applications on the Internet, calling companies to request employment applications, and filling out applications in person. (Tr. of May 7, 2003, at 378-80; *see generally* CX-20, Records of Employment Sought). Complainant further testified that, during his efforts to retain new employment, he encountered at least two instances where potential employers had a negative reaction toward Complainant after either receiving Complainant's DAC report or after Complainant explained the circumstances regarding his discharge from Respondent. (Tr. of May 7, 2003, at 385-86). Complainant testified that he did not attempt to secure employment in any industry other than the trucking industry, and did not attempt to secure positions other than that of truck driver. (Tr. of May 8, 2003, at 582).

While Complainant did not testify specifically as to the exact date he began to seek employment following his discharge from Respondent, part of Complainant's Exhibit 20 is an excerpt from an employment application log that Complainant testified he kept while seeking

employment; Complainant testified that he began keeping the log on April 8, 2002. (Tr. of May 7, 2003, at 394; CX-20, at 59). Further, the dates contained within Complainant's Exhibit 20 indicate that he sought employment throughout the course of 2002 until being hired at his current position with Fleet Source, Incorporated. He began working there approximately March 22, 2002. (Tr. of May 7, 2003, at 395-96, 398). Prior to gaining employment with Fleet Source, Complainant stated that he attended driver orientation for J.B. Hunt, Incorporated, during the first week of September, 2002. (Tr. of May 8, 2003, at 649-50). However, after the orientation, Complainant stated that he was never assigned a truck and was effectively dispatched without explanation. (Tr. of May 8, 2003, at 577-78).

When deciding whether an employee has made a reasonably diligent effort to mitigate his damages, it must be remembered that the employee is not required to accept any employment that is not "virtually identical in promotional opportunities, compensation, job responsibilities, working conditions, and status." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983) (citations omitted). Complainant has secured a position as a truck driver for Fleet Source, Inc. making approximately $677.71 per week, which equates to driving approximately 2,300 miles at his pay rate of twenty-nine cents per mile. (Tr. of May 7, 2003, at 396-98). I find that Complainant's current employment is substantially equivalent to his former position with Respondent, when comparing the job title, duties, and rate per mile.

Taking Complainant's testimony and the evidence before me, I find that Complainant exercised reasonable diligence in securing substantially equivalent employment and subsequently in mitigating his damages. Therefore, even if Respondent had proven available comparable jobs, Respondent has failed to prove that Complainant did not mitigate his damages.

D. Proper Relief

Because I find that Respondent has not proven that comparable jobs were available, and has further failed to prove, even if it met its initial burden regarding comparable jobs, that Complainant failed to mitigate his damages, I find the following relief is proper in this case.

1. Reinstatement

Section 405 directs that an employee shall be reinstated upon a finding of discrimination under the Act. Pursuant to 29 C.F.R. § 1978.109(b), reinstatement must take effect "immediately upon receipt of the decision by the named person." Complainant affirmatively prayed for reinstatement in his relief requested. In his testimony, Complainant stated that he wants to return to work for Respondent. Complainant testified that he did not have a problem with Respondent, but rather, disagreed with Schilli Leasing and how repairs were handled. (Tr. of May 8, 2003, at 572). Complainant is entitled to be reinstated under the statute, and I hereby find that Respondent must reinstate Complainant effective immediately.

2. Back Pay

Back pay is also a mandatory award once a violation of the Act is established. An award of back pay serves to make an employee whole following an incident of discrimination. *Loeffler*

v. Frank, 486 U.S. 549, 558 (1988). Back pay is computed by first determining the average weekly wage. In this case, because Complainant's pay is based upon the number of miles driven weekly, the average weekly wage is computed by determining the average number of miles driven per week. Average miles are normally computed by dividing the total number of miles driven for Respondent by number of weeks he worked for Respondent. The resulting average number of miles is then multiplied by the rate per mile to which Complainant would have been entitled had his employment continued uninterrupted with Respondent, which results in the average weekly wage. The average weekly wage is then multiplied by the number of weeks from the date of Complainant's discharge to the date a reinstatement offer is made. Complainant's interim wages are then subtracted from the total back pay due. *See Asst. Sec'y v. Double R. Trucking, Inc.*, Case No. 1998-STA-34, ARB Supp. Dec. & Order, Jan. 12, 2000, at 2-3; *see also Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1279-80 (4th Cir. 1985). Back pay accrues until an offer of unconditional reinstatement is made. *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 239 (1982) (concluding that back pay liability ceases upon an unconditional offer of reinstatement)). Pursuant to 29 C.F.R. § 20.58(a), interest is then computed based upon the rate and methodology set forth in 26 U.S.C. § 6621 (2002).

a. Complainant's Back Pay

According to the testimony given and evidence received, Complainant's initial pay rate was thirty cents per mile. (Tr. of May 6, 2003, at 90; CX-1, Employment Contract, October 30, 2001, at 10). Complainant's Employment Contract indicates that after six months of service with Respondent, Complainant would have received a raise, increasing his rate per mile to thirty-and-one-half cents. (CX-1, at 10). One year from hire, Complainant's rate per mile would have been thirty-one cents per mile. (Tr. of May 6, 2003, at 90; CX-1, at 10). Two years after employment, Complainant would have been earning thirty-two cents per mile. (CX-1, at 10). When Complainant applied for employment as a long haul driver with Respondent, Respondent advertised average weekly miles between 2,500 and 2,800 miles. (Tr. of May 6, 2003, at 91; CX-3, Recruitment Pay Schedule, at 1). Upon examination, Mr. Blackstock represented that the "advertisement was based on what a productive driver could expect to earn who conformed and produced." (Tr. of May 6, 2003, at 92). Respondent provided no other evidence as to the appropriate amount of back wages due Complainant.

In his Post-Hearing Brief, Complainant asserts that he is entitled to back wages of $67,706.80, itemized as follows:

> December 28, 2001, to April 29, 2002, $14,632.80 (thirty cents per mile)
> April 30, 2002, to October 29, 2002, $22,204.00 (thirty and-one-half cents per mile)
> October 30, 2002, to June 30, 2003, $30,870.00 (thirty one cents per mile)

(Compl. Post-Hr'g Br., at 48). In his calculations, Complainant assumes that he would have driven 2,800 miles per week had he continued to work for Respondent. (Compl. Post-Hr'g Br., at 48).

To this extent, Complainant did not testify as to his average number of miles driven per week when he was employed with Respondent. The payroll statement found at Complainant's Exhibit 15 contains an itemization of the number of miles driven between December 18, 2001, and December 22, 2001. During this five-day period, Complainant drove 1,822 miles. However, this number is likely somewhat skewed as these dates immediately precede the Christmas holiday and because of the problems with the truck/trailer during this time period.

Complainant's Exhibit 14 contains Complainant's W-2 forms for the 2001 tax year. According to the W-2, Complainant earned $3,303.90 in 2001 while employed with Respondent. If this amount is divided by thirty cents per mile (the rate at which Complainant was paid), the result is the total number of miles driven by Complainant during those two months, or 11,013 miles. Dividing the total number of miles by the number weeks Complainant worked for Respondent provides an average number of miles driven per week of 1,285 miles. There are two reasons that this calculation would not yield an accurate basis upon which to calculate Complainant's back wages. First, Mr. Blackstock admitted that Complainant began driving during a "slow time of the year," that being the Thanksgiving and Christmas holidays, and thus, his pay for the two months he worked for Respondent would not necessarily correlate to an accurate average wage. (Tr. of May 6, 2003, at 91). However, there is another reason that this amount cannot be taken as an accurate depiction of the average number of miles driven by Complainant. Respondent has a policy of deducting, at a rate of fifty cents per mile, the amount of out of route miles driven by Complainant. (*See* CX-15, at 2 (showing that Complainant's pay was reduced by $47.00 for out of route mileage); *see also* Tr. of May 7, 2003, at 377). Therefore, Complainant's total pay would be reduced at a rate greater than his pay rate per mile driven. Subsequently, deducing the average number of miles driver per week by Complainant in this manner would not yield an accurate result, absent additional information and evidence.

There is no way to know whether Complainant would have driven an average of at least 2,800 miles per week had he remained employed with Respondent. Mr. Blackstock testified to a range between 2,500 and 2,800 miles per week, as opposed to a definitive number of miles. Uncertainties in calculating back pay are construed against the discriminating employer. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1563 (11th Cir. 1986); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975); *Kovas v. Morin Transp., Inc.*, Case No. 92-STA-41, Sec'y Final Dec. & Order, Oct. 1, 1993, at 4. Further, calculations of back pay "must be reasonable and supported by the evidence of record, but need not be rendered with 'unrealistic exactitude.'" *Cook v. Guardian Lubricants, Inc.*, Case No. 1995-STA-43, ARB Second Dec. & Order of Remand, May 30, 1997, at 10 n.12 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)). At the same time, the overriding "make whole" principle must not be ignored.

Taking the evidence as a whole, I find that the proper mileage upon which to compute Complainant's back pay is 2,500 miles per week. I must presume that Respondent's advertisement as to the average weekly mileage takes into account the "slow periods" around holidays such as Thanksgiving and Christmas. Nothing in the evidence contradicts the fact that Complainant began working for Respondent during a slow period of the year. Further, the evidence indicates neither that Complainant would have driven the higher, rather than the lower, amount of average weekly miles, nor that Complainant ever drove 2,800 miles per week for

Respondent. By using 2,500 miles per week as a benchmark, the uncertainty of whether Complainant would have ever driven at least 2,500 miles per week is resolved against the employer while Complainant is still made "whole."

b. Complainant's Interim Wages

Complainant testified that his current employer, Fleet Source, pays him twenty-nine cents per mile. (Tr. of May 7, 2003, at 396). Complainant stated that he "really [had not] paid much attention" to the average number of miles he was driving per week with Fleet Source, but that one week he drove approximately 2,400 miles. (Tr. of May 7, 2003, at 396). Complainant's Exhibit 17 shows that Complainant's year-to-date gross wages as of April 19, 2003, for four weeks of pay, were $2,710.84. (Tr. of May 7, 2003, at 398; CX-17, Payroll Stub from Fleet Source, Inc., at 1). Per week, then, Complainant is earning an average gross income of $677.71, which equates to driving approximately 2,300 miles per week. Respondent has not submitted any evidence to controvert this amount. Therefore, I find that Complainant's interim wages equal $677.71 per week commencing March 22, 2003 (the date four weeks prior to April 19, 2003).

c. Interest on Back Pay

Complainant is entitled to both pre- and post-judgment interest on the amount of back pay awarded. 29 C.F.R. §20.58(a) (2003). Interest is calculated based upon the formula set forth under 26 U.S.C. § 6621; the applicable interest rate is the rate payable for the underpayment of federal income tax, and interest is compounded quarterly. Pre-judgment interest accrues from the date of discharge until the date of reinstatement. Post-judgment interest accrues until the award is paid. 26 U.S.C. § 6621(a)(2) (2002); *Murray v. Air Ride, Inc.*, Case No. 1999-STA-34, ARB Final Dec. & Order, Dec. 29, 2000, at 8; *Johnson v. Roadway Express, Inc.*, Case No. 1999-STA-5, ARB Dec. & Order of Remand, Mar. 29, 2000, at 16; *Asst. Sec'y v. Double R. Trucking, Inc.*, Case No. 1998-STA-34, ARB Supp. Dec. & Order, Jan. 12, 2000, at 3 (citation omitted). Section 6621 of the Internal Revenue Code provides that the appropriate interest rate is the sum of the federal short-term rate (determined quarterly) plus three percentage points. Therefore, pursuant to the regulations, the Respondent will be ordered to pay interest in accordance with 29 C.F.R. § 20.58(a) and 26 U.S.C. § 6621.

d. Final Calculation of Back Pay

I find that Complainant is entitled to total back wages for the period of December 28, 2001, to June 30, 2003, less interim wages, of $49,997.27, plus interest as set forth above. This result is represented in the following calculation, assuming that Complainant would have driven 2,500 miles per week had his employment with Respondent continued uninterrupted:

Back Pay (December 28, 2001, to April 29, 2002) (17.42 weeks):	$13,065.00
Back Pay (April 30, 2002, to October 29, 2002) (26 weeks):	$19,825.00
Back Pay (October 30, 2002, to June 30, 2003) (34.57 weeks):	$26,791.75
Total Back Pay (December 28, 2001, to June 30, 2003):	$59,681.75

Less Interim Wages (March 22, 2003 to June 30, 2003) (14.29 weeks): –$ 9,684.48

Net Back Pay: **$49,997.27**

Back pay continues to accrue until an offer of unconditional reinstatement is made. Therefore, Complainant will be entitled to additional weekly back pay of $775.00 per week,[17] less interim wages earned, from July 1, 2003, until an offer of reinstatement is made. Interest will accrue on this amount as well in accordance with the formula set forth above as to pre- and post-judgment interest. In his Post-Hearing Brief, Complainant requested the opportunity provide evidence of interim wages earned after June 30, 2003, and I will so order.

3. Pay Deductions for Advances

Complainant testified that he did not receive a pay check with the payroll statements he received dated February 1, 2002, and February 8, 2002. He explained that, contrary to the payroll statement, he did not take a "driver advance" in the amount of $552.10 during that pay period. (Tr. of May 7, 2003, at 376; CX-13, Payroll Summary & Detail, Feb. 1, 2002, at 1). Complainant's Exhibit 16 purports that during the following pay period, represented by the payroll statement dated February 8, 2002, an additional advance of $11.11. (CX-16, Payroll Summary & Detail, Feb. 8, 2002, at 1). Together, these advances equal $563.21. Respondent presented no evidence to controvert Complainant's statements that he did not receive a pay check on either February 1, 2002, or February 8, 2002. There is no issue with Complainant's credibility on this point, and therefore I find that Complainant is entitled to recover the amounts that were incorrectly deducted from his final two paychecks in the total amount of $563.21, representing wages from his final weeks of work for Respondent.

4. Attorney Fees and Costs

Complainant requested in his Post-Hearing Brief that he be allowed to supplement the record with evidence regarding his attorney fees and costs should a recommended decision and order be issued in his favor. As this recommended decision and order is in Complainant's favor, counsel for Complainant is granted additional time to supplement the record with evidence as to his attorney fees and costs. However, any further proceedings regarding the attorney's fee will be conducted separately from this decision on the merits.

5. Non-Monetary Relief

The Administrative Review Board has held that the "standard remedy in discrimination cases [is to] notif[y] a respondent's employees of the outcome of a case against their employer." *Michaud v. BSP Transp., Inc.*, Case No. 1995-STA-29, ARB Final Dec. & Order, Oct. 9, 1997, at 9, *rev'd on other grounds sub nom. BSP Transp., Inc. v. United States Dep't of Labor*, 160

[17] Complainant's back pay is computed as 2,500 miles per week at thirty-one cents per mile. Complainant's rate per mile would have increased to thirty-two cents per mile effective October 30, 2003, had he remained employed with Respondent. Therefore, for any wages that accrue after that date, the weekly wage rate for Complainant will be $800.00, or 2,500 miles per week at thirty-two cents per mile.

F.3d 38 (1st Cir. 1998). The ARB also commonly orders employers to delete all information pertaining to an employee's wrongful or discriminatory discharge from its personnel records. *See Michaud*, Case No. 1995-STA-29, at 9;*Asst. Sec'y v. T.O. Haas Tire Co.* , Case No. 1994-STA-2, Sec'y Final Dec. & Order, Aug. 3, 1994, at 6; *Shamel v. Mackey*, Case No. 1985-STA-3, Sec'y Final Dec. & Order, Aug. 1, 1985, at 1.

Complainant's prayer for non-monetary relief is reasonable in light of the finding of retaliatory discrimination in this case. Therefore, Respondent will be directed to post this decision at all of its terminals for sixty (60) consecutive calendar days at all places where such notices are customarily placed; amend Complainant's DAC record to delete all unfavorable information concerning Complainant's protected activity, including but not limited to showing continuous employment, and deleting the "request for personal contact." Respondent will also be directed to expunge from its personnel records all information adverse to Complainant's interests regarding Complainant's protected activity from its personnel files.

As to Complainant's request that his DAC record be amended to show that he is eligible for rehire, it appears that, if this notation were included on Complainant's DAC record, this would indicate to future employers that there was a period of time where Complainant was not employed by Respondent without any further explanation, and may be cause for subsequent explanation by Complainant. Therefore, I will instead order that Respondent shall delete any reference to eligibility for rehire. In the event that Complainant should choose not to be reinstated by Respondent, only then should a notation be made on Complainant's DAC record, that he left in good standing and is eligible for rehire.

Finally, although the motion to amend the complaint to include additional entities (Wauvasha Valley Transportation, Schilli Specialist, WVT of Texas, Schilli Leasing, Schilli Transportation Services, and Schilli Distribution Services), with whom Employer has a business relationship, was not granted, Respondent will be directed to notify all of these entities of this decision; Respondent will be directed to ensure that any adverse information placed by such entities, if any, is removed from the Complainant's DAC report; and if there is additional expense required to take such action, such shall be paid by Respondent. In short, it is Respondent's obligation to ensure that the DAC report is corrected.

ORDER

Accordingly, it is ORDERED that:

1. Respondent, Atlantic Inland Carrier, shall reinstate Complainant, John Griffith, to employment, effective immediately, but shall permit Complainant to give appropriate notice to his present Employer if he so needs in order to leave that employment in good standing;

2. Respondent shall pay to Complainant back wages for the period of December 28, 2001, to June 30, 2003, in the amount of $49,997.27, plus interest commencing on December 28, 2001, the date of Complainant's discharge, in accordance with the regulation;

3. Respondent shall pay to Complainant back wages of $775.00 per week, less interim wages earned, from July 1, 2003, until an unconditional offer of reinstatement is made, plus interest from the date each weekly paycheck would have been due and payable;

4. Complainant shall, within 30 days of receipt of this order, submit evidence to the Respondent as to interim wages earned from July 1, 2003, to present, for which the Respondent is entitled to credit against back wages payable from and after July 1, 2003;

5. Respondent shall pay to Complainant the sum of $563.21, representing payroll deductions in the form of driver advances that were not taken by Complainant;

6. Respondent shall take the actions necessary to immediately post this decision at all of its terminals for sixty (60) consecutive calendar days at all places where such notices are customarily placed;

7. Respondent shall expunge all adverse information regarding Complainant's protected activity from its personnel files;

8. Respondent shall ensure that Complainant's DAC record is corrected to delete all unfavorable information, including but not limited to showing continuous employment, deleting the statement that Complainant is not eligible for rehire, and deleting the "request for personal contact;"

9. Respondent shall notify Wauvasha Valley Transportation, Schilli Specialist, WVT of Texas, Schilli Leasing, Schilli Transportation Services, and Schilli Distribution Services of this decision and shall ensure that any adverse information placed by such entities, if any, is removed from the Complainant's DAC report;

10. If Complainant chooses not to accept Respondent's reinstatement offer, it is also ordered that Complainant's DAC record reflect that he is eligible for rehire with Respondent;

11. Complainant's Motion to Amend Complaint to Add Additional Party-Respondents is denied; and

12. Counsel for Complainant shall, within 30 days of receipt of this order, submit a fully documented fee petition as to attorney fees and costs.

A

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. §§ 1978.109(a) (2002).